

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Original with Affidavit of
Mailing*

75-1069

To be argued by
ROBERT F. KATZBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1069

UNITED STATES OF AMERICA,

Appellee,

—against—

ISABELIO RIOS,

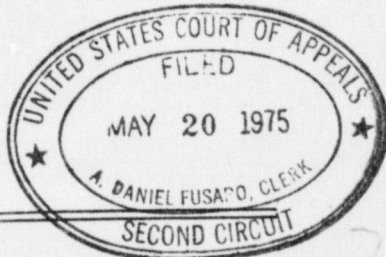
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
ROBERT F. KATZBERG,
*Assistant United States Attorneys,
Of Counsel.*



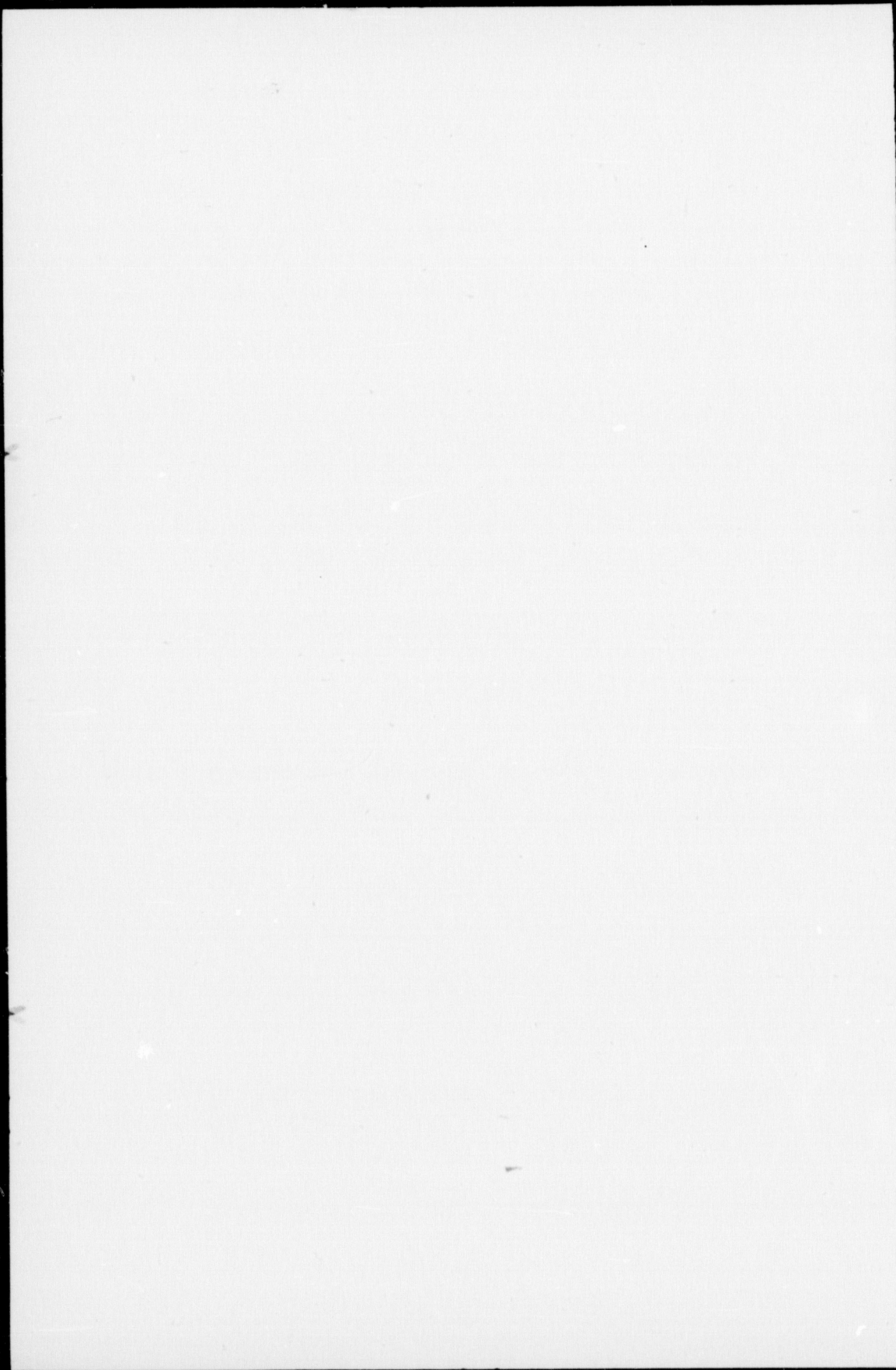


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	3
A. The Trial	3
1. The Government's Direct Case	3
2. The Defendant's Case	5
3. The Government's Rebuttal Case	7
B. The Pretrial Competency Hearing	9
ARGUMENT:	
POINT I—Appellant's due process rights were not violated	10
POINT II—The examination of the psychiatrists testi- fying for the Government were proper and adequate and their testimony was properly received	13
POINT III—Judge Platt's determination that appellant was competent to stand trial was correct	16
POINT IV—The trial judge properly submitted the case to the jury	18
CONCLUSION	19
APPENDIX	
Excerpt of transcript from pretrial conference, Sept. 4, 1974	1a

TABLE OF CASES

	PAGE
<i>Drope v. Missouri</i> , — U.S. —, 95 S. Ct. 896 (1975)	12, 15
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	17
<i>Hall v. United States</i> , 410 F.2d 653 (4th Cir.), <i>cert. denied</i> , 396 U.S. 970 (1969)	17
<i>Krupnick v. United States</i> , 264 F.2d 213 (8th Cir. 1959)	17
<i>United States v. Barrera</i> , 486 F.2d 333 (2d Cir. 1973), <i>cert. denied</i> , 416 U.S. 940 (1974)	18
<i>United States v. Bohl</i> , 475 F.2d 872 (2d Cir. 1973)....	14, 18
<i>United States v. Day</i> , 333 F.2d 565 (6th Cir. 1964)	17
<i>United States v. Driscoll</i> , 399 F.2d 135 (2d Cir. 1968)	13
<i>United States v. Gray</i> , 421 F.2d 316 (5th Cir. 1970)	17
<i>United States v. Greene</i> , 489 F.2d 1145 (D.C. Cir. 1973), <i>cert. denied</i> , — U.S. —, 95 S. Ct. 239 (1974)	18
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965), <i>cert. denied</i> , 383 U.S. 907 (1966)	13
<i>United States v. Jacquillon</i> , 469 F.2d 380 (5th Cir. 1972), <i>cert. denied</i> , 410 U.S. 938 (1973)	14
<i>United States v. Kaufman</i> , 393 F.2d 172 (7th Cir. 1968), <i>cert. denied</i> , 393 U.S. 1098 (1969)	12
<i>United States v. Knohl</i> , 379 F.2d 427 (2d Cir.), <i>cert. denied</i> , 389 U.S. 973 (1967)	11
<i>United States v. Kohlman</i> , 469 F.2d 247 (2d Cir. 1972)	14
<i>United States v. Matos</i> , 409 F.2d 1245 (2d Cir. 1969), <i>cert. denied</i> , 397 U.S. 927 (1970)	14

<i>United States v. Mattson</i> , 469 F.2d 1234 (9th Cir. 1972), <i>cert. denied</i> , 410 U.S. 986 (1973)	14
<i>United States v. Polisi</i> , — F.2d — (2d Cir. slip op. 2787, decided April 8, 1975)	14
<i>United States v. Santana</i> , 503 F.2d 710 (2d Cir.), <i>cert. denied</i> , — U.S. —, 95 S. Ct. 632 (1974)	15
<i>United States v. Sullivan</i> , 406 F.2d 180 (2d Cir. 1969)	17
<i>United States v. Voucteras</i> , 500 F.2d 1210 (2d Cir.), <i>cert. denied</i> , — U.S. —, 95 S. Ct. 656 (1974)	12

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1069

UNITED STATES OF AMERICA,

Appellee,

—against—

ISABELLO RIOS,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Isabello Rios appeals from a judgment of the United States District Court for the Eastern District of New York (Judd, *J.*) entered on December 10, 1974, convicting him of possession with the intent to distribute heroin in violation of Title 21 U.S.C., § 841(a)(1).

On February 7, 1974, Judge Judd sentenced appellant to six years imprisonment, a five year special parole term and a fine of seven thousand dollars, with the recommendation that the prison sentence run concurrently with a prior state sentence of two years to life. Appellant is currently incarcerated under the state sentence.

A pretrial competency hearing was held before the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York on November 22, 25 and

December 2, 1974. After hearing the testimony of three psychiatrists and one medical technician, Judge Platt found appellant competent to proceed with trial. Trial commenced on December 4, 1974, before Judge Orrin G. Judd. On December 10, 1974, the jury found appellant guilty of count one but not guilty of count two of the indictment.*

On this appeal appellant contends that the use of English speaking psychiatrists was violative of due process in that appellant speaks only Spanish (Point I); that government psychiatrists in part based their conclusions on hearsay and did not conduct a thorough examination, depriving appellant of a fair trial (Point II); that Judge Platt's competency determination was clearly erroneous (Point III); and finally, that appellant's motion for judgment of acquittal on the issue of criminal responsibility was improperly denied prior to the submission of the case to the jury (Point IV).

* Count two of the indictment charged appellant with possession and intent to distribute cocaine. Previously, the United States had withdrawn count three of the indictment which charged appellant with conspiracy. The withdrawal of this count had nothing whatever to do with appellant's claim of incompetency as intimated at page 6 of appellant's brief. The withdrawal was made in recognition of appellant's previous conviction in the state court for selling narcotics in the same month, November, 1973, as charged in the instant indictment (C. 60-61, December 2, 1974). It is noteworthy that appellant did not claim insanity as a defense to the state charges (Transcript of pretrial conference, September 4, 1974, before Honorable Thomas C. Platt, page 7-10; Appellee's Appendix, 1a-3a). See, footnote on page 9, *infra*, for an explanation of competency hearing page references.

Statement of the Case

A. The Trial

I. The Government's Direct Case

Cruz Cordero, an undercover narcotics agent employed by the Drug Enforcement Administration (T. 20),* testified that on November 26, 1973 he was introduced to appellant by one Bobby Rodriguez, a confidential informant (T. 22, 26). At this meeting, which took place in appellant's apartment, Agent Cordero, after being introduced to appellant, said he was interested in purchasing heroin and that he had heard appellant had some of the best heroin available for sale. Appellant agreed (T. 27). After bargaining about the price per ounce and the quantities to be purchased, appellant agreed to sell Agent Cordero approximately one ounce of heroin (T. 27-29). He then advised Agent Cordero that he had just sold six ounces of heroin to another customer that day and that Cordero would have to return on November 28, at about 2:00 P.M. to conclude the transaction. Appellant told Cordero to have his money ready for their next meeting (T. 29-30).

Agent Cordero returned to appellant's apartment on November 28, 1973 at 3:30 P.M. (T. 30). At that time, appellant told Cordero he was late; that he had just sold the heroin to another customer and that Cordero would have to return the following day (T. 32). After confirming the price (T. 32), Cordero was told the heroin would take a "three-cut"; that appellant could also get Cordero any amount of cutting agents he desired and "any time [Cordero] wanted to buy any amount of heroin he [appellant] would take care of it" (T. 32-33). Cordero then asked for a sample (T. 34). Appellant left the room, returned with

* Page references in parenthesis preceded by the letter "T" refer to pages in the trial transcript.

a jar of brown, rock crystal, cut off a piece with a razor and handed it to Cordero. The sample of heroin was introduced into evidence as Government's exhibit one (T. 34, 36).

On the following day, November 29, 1973, Agent Cordero returned to appellant's apartment at approximately 5:00 P.M. (T. 37-38). Appellant opened the door part way and said he was busy taking care of other customers and that Cordero should return in fifteen minutes at which time his package would be ready (T. 38). Cordero returned in fifteen minutes (T. 38). At 5:30 P.M. Cordero knocked on appellant's door; appellant looked out through a peep hole in the door and stated he was afraid to let Cordero in because he felt police were around (T. 39).^{*} Appellant then stated that he would let Cordero into the apartment, but if he found out that Cordero was "the man" he would "get" Cordero some day (T. 39). Appellant then told Cordero to have his money ready and opened the door (T. 39-40), whereupon the surveillance agents entered behind Cordero.

Robert Marsh, a special agent for the Drug Enforcement Administration testified that he drove Cordero to appellant's apartment on November 26, 1973, November 28, 1973 and November 29, 1973 (T. 111-119). Marsh identified exhibit number one as the sample Cordero brought to him after meeting with appellant on November 28, 1973 (T. 116-117). Agent Marsh testified, further, that he was present in appellant's apartment on November 29, 1973 when Mr. Rios was arrested (T. 120-121) and was in charge of the search that followed (T. 122). (The search was based upon a search warrant, the validity of which has never been an issue in this case). Marsh identified a number of "cutting agents," approximately one ounce of

^{*} There was, in fact, a group of surveillance agents from the Drug Enforcement Administration at the site (T. 40, 118).

heroin (exhibit two), a small quantity of cocaine, numerous articles of narcotics paraphernalia, and \$6,528 in cash as having been seized from appellant's apartment (T. 122-172). The foregoing terms were received in evidence. Agent Marsh also testified to uncovering a trap door in the bedroom floor where some of the items seized had been found (T. 137).

Stanley Blasoff, a forensic chemist for the Drug Enforcement Administration, testified that the sample given to Agent Cordero on November 28, 1973 (exhibit one) was 37.9 percent pure heroin (T. 236); that exhibit two, found during the search, contained approximately one ounce of 36 percent pure heroin (T. 237); that exhibit three, found on Mr. Rios' person (T. 132-133), was 72.2 percent pure cocaine (T. 238-239). Mr. Blasoff also identified a number of "cutting agents" found in Mr. Rios' apartment such as quinine (T. 240) and lactose (T. 241).

Mary Ann Messina, a New York City undercover police officer testified to prior "similar act" purchases of heroin from appellant (T. 270). Patrolwoman Messina stated that on November 20, 1973, she purchased ten packets of heroin from appellant (T. 271, 279) for ninety dollars (T. 279-280). Patrolwoman Messina testified that she also purchased heroin from appellant on November 21, 1973, for one hundred dollars (T. 280-282). It was stipulated that the items purchased on these occasions (exhibits eleven and twelve) contained heroin (T. 290).

2. The Defendant's Case

Doctor Maria Fleetwood, a teaching psychiatrist at New York Hospital (T. 363), was called as witness for appellant and was qualified to give an expert opinion in psychiatry (T. 368). Doctor Fleetwood conducted an examination of appellant on October 8, 1974, at the Federal Detention

Facility at West Street, which examination was in the Spanish language (T. 368, 370). Doctor Fleetwood diagnosed appellant as schizophrenic, schizo-affective type (T. 370), referring specifically to appellant's complaints of hallucinations (T. 371), and his attempts at suicide (T. 376). Doctor Fleetwood stated that appellant could not know right from wrong nor control his impulses in November, 1973 (T. 393-394).

On cross-examination, Doctor Fleetwood testified that she did not know the charges against Mr. Rios when she examined him on October 8, 1974 (T. 410, 413); that she reported Mr. Rios to be oriented "in space" and "in person" but meant only that he was oriented "in space" (T. 418-419); that he was able to concentrate, but in a limited way (T. 420) and that his intelligence was average (T. 419). Doctor Fleetwood testified that appellant complained of headaches and buzzing in his ears but she did not seek to verify these complaints with the medical staff at West Street (T. 421-423); that he complained he could not sleep at night (T. 428) but she did not try to verify that complaint either (T. 429). Doctor Fleetwood further stated that in her opinion, someone suffering from schizophrenia could not act in his own behalf (T. 433); could not protect his own interest (T. 434); could not negotiate a business transaction (T. 435) and would not be able to realize a realistic danger if one presented itself to him (T. 436).

Significantly, Doctor Fleetwood concluded with respect to appellant's conduct that "he knew he was doing something illegal . . . I am sure he must have known that" (T. 439).

Appellant testified on his own behalf (T. 462). When asked by his counsel if he were "crazy" he said "not now" (T. 463). He denied selling Cordero heroin, denied receiving money from him, denied ever selling heroin to anyone (T. 467), yet admitted giving Cordero the sample of heroin

(exhibit one) but denied selling undercover policewoman Messina any heroin (T. 469). Appellant admitted that the apartment in question was his (T. 471), denied knowing about the trap door (T. 471), denied owning the cash found in the apartment (T. 474) and admitted that the ounce of heroin in evidence (exhibit two) belonged to him (T. 474-475).

On cross-examination, Mr. Rios admitted to a \$200 a day heroin habit (T. 481), that he had been out of work and when he did work he earned about fifty to sixty dollars per day (T. 482).

3. The Government's Rebuttal Case

Doctor Raymond Chaitin, a psychiatrist at Kings County Hospital, was called and, without objection, qualified as an expert witness (T. 486, 489). Dr. Chaitin testified that he has conducted over 1,000 psychiatric examinations of non-English speaking individuals by using interpreters (T. 490). He stated that appellant's thinking was orderly; that appellant had no trouble with his memory and he found that appellant evidenced no signs of psychosis (T. 494-495). Doctor Chaitin stated, based upon the agents' reports of appellant's behavior on November 26, 28, and 29, 1973, that appellant was not suffering from any mental disease or defect on November 29, 1973 (T. 498-500).

Harry Stevens, a medical technician at the Federal House of Detention at West Street was called and testified to the manner in which medical records are kept at West Street (T. 539-542). Appellant's medical file was introduced into evidence (T. 542). That record revealed that on November 30, 1973 he was treated for heroin detoxification (T. 543), and that shortly thereafter, in early December, 1973, he complained of a number of symptoms usually associated with heroin withdrawal such as vomiting (T. 544-546). Thereafter, there were no further

complaints until June 4, 1974 when he complained of constipation (T. 547). Appellant registered the same complaint on June 7 and June 11 (T. 547). Appellant's medical record was barren of any complaints of buzzing in his ears, sleeplessness, hallucinations or any other complaints.

Doctor Daniel Schwartz, Director of Forensic Psychiatry at Kings County Hospital was called as the final government rebuttal witness (T. 558). As with Dr. Chaitin, Dr. Schwartz was qualified as an expert without objection (T. 561). Doctor Schwartz testified that he examined appellant on March 13, 1974 by use of a Spanish speaking interpreter (T. 562). He could not recall the name of the interpreter (T. 563). Doctor Schwartz testified that he has conducted such examinations by using interpreters on approximately 100 occasions (T. 563). He had a copy of the indictment during the examination and discussed the charges with Mr. Rios (T. 563). Doctor Schwartz testified that appellant responded coherently and appropriately to the questions asked (T. 564); that his thinking was orderly (T. 566); that he acted normally and did not seem depressed, agitated or severely withdrawn (T. 567). The doctor also testified that he read the agent's reports about the current charges. He was then asked a series of hypothetical questions based upon the facts adduced at trial (T. 568-571). Based upon his examination and the hypothetical facts, Doctor Schwartz concluded "the defendant was criminally responsible" at the time of the offense and was not suffering from a mental disease or defect that would prevent him from appreciating that what he was doing was wrong (T. 572-573).

Finally, Doctor Schwartz stated the use of an interpreter did not seriously impair his ability to examine Mr. Rios; that he can *examine* a non-English speaking person for an *evaluation*, but he could not *treat* such a person by using an interpreter (T. 574-575); that while it would be "ideal" to use a Spanish psychiatrist to examine a Spanish speaking

individual, "in my opinion, I was able to do an adequate examination. Had I had any doubt about my ability to do so, I would not have done it" (T. 613).

B. The Pretrial Competency Hearing

The same witnesses who were to appear in the defense case and the government's rebuttal case testified to essentially the same facts in the pretrial competency hearing. No purpose would be served by repeating their testimony. Suffice it to say that their testimony appears in the following transcribed testimony: Harry Stevens (C. 9-35, November 22, 1974);* Doctor Daniel Schwartz (C. 35-77, November 22, 1974) and Doctor Raymond Chaitin (C. 8-47, November 25, 1974) testified for the government. Doctor Maria Fleetwood (C. 4-60, December 2, 1974) testified on behalf of appellant. A fuller description of their testimony at the competency hearing is set forth in Point III, *infra*.

* As noted in appellant's brief, the transcripts of the competency hearing were not consecutively numbered. Accordingly, the government's brief will, for consistency, denote competency hearing page references in the same way that appellant's brief does, preceded by the letter "C". The date the testimony was taken follows the page number.

ARGUMENT

POINT I

Appellant's due process rights were not violated.

Appellant contends, in effect, that since he was examined by two psychiatrists who required interpreters, his rights under the due process clause of the Fifth Amendment were violated when the District Court relied upon their opinion of his mental condition and not the opinion of the one Spanish speaking psychiatrist who examined him. This contention is without merit.

There is no question that appellant was examined by three psychiatrists, one of whom was Spanish speaking. That psychiatrist, Doctor Maria Fleetwood, testified both at the competency hearing and at trial. Thus, appellant's position must be that the due process clause of the Fifth Amendment requires a Spanish speaking defendant to be examined only by Spanish speaking psychiatrists. Appellant, unable to cite any cases which support this proposition, relies instead on the allegation that "the use of an interpreter interfered with his ability to communicate with the English-speaking psychiatrists, and severely limited the reliability of their diagnosis" (Appellant's brief, p. 23).

The record, however, contradicts appellant's assertion. Doctor Schwartz testified that the use of an interpreter did not seriously impair his ability to examine Mr. Rios (T. 574) and that "In my opinion, I was able to do an adequate examination. Had I had any doubt about my ability to do so, I would not have done it" (T. 613). Doctor Chaitin testified that while he would not recommend undergoing years of treatment with a psychiatrist utilizing an interpreter, "for diagnosis, an interpreter would be fine" (T. 535).

Moreover, to require the exclusive use of Spanish-speaking psychiatrists for Spanish speaking defendants ignores the realistic situation at institutions where psychiatric examinations are given. At the time of Judge Judd's order requiring an examination by a Spanish-speaking psychiatrist, April 18, 1974, Kings County Hospital had no Spanish-speaking psychiatrist on its staff.* Moreover, there was apparently only one Spanish-speaking psychiatrist, Doctor Jimenez, who could be recommended.**

Thus, to require that psychiatric examinations of Spanish-speaking defendants be conducted only by Spanish-speaking psychiatrists, is not only unnecessary from a psychiatric/diagnostic point of view, but given the number of potential Spanish-speaking defendants to be examined and the number of available Spanish-speaking psychiatrists, a virtual impossibility.

Appellant's contention that his right to due process of law was violated ignores the fact that three psychiatrists were appointed to examine him under § 4244 of Title 18, one of whom spoke Spanish; a three day hearing was held in which four witnesses testified and appellant was provided every opportunity to present evidence.*** As this Court has stated ". . . § 4244 was not enacted in contravention of due process but in aid of it." *United States v. Knohl*, 379 F.2d 427, 435 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

* Letter dated May 16, 1974, from Doctor Daniel Schwartz, Director, Forensic Psychiatry Service, Kings County Hospital to Hon. Orrin G. Judd, attached to appellant's brief as Exhibit I.

** The government would be prepared to demonstrate the efforts (unsuccessful) that it had made to obtain a Spanish-speaking psychiatrist.

*** The hearing was delayed due to defense counsel's inability to produce Doctor Fleetwood as scheduled. (C. 5-6, November 25, 1974; C. 3-5, November 22, 1974).

The situations where federal courts have found a denial of due process are cases where despite evidence of mental defect, an examination by at least one qualified psychiatrist was not ordered or no hearing was held and the defendant was ordered to trial. *See, e.g., Drope v. Missouri*, — U.S. —, 95 S. Ct. 896 (1975). Significantly, denial of a hearing in certain cases is not violative of due process. *See, e.g., United States v. Vowteras*, 500 F.2d 1210 (2d Cir.), *cert. denied*; — U.S. —, 95 S. Ct. 656 (1974). *See, also, United States v. Kaufman*, 393 F.2d 172 (7th Cir. 1968), *cert. denied*, 393 U.S. 1098 (1969) where denial of a hearing was upheld even though the psychiatric report which found defendant competent stated he was a "sociopathic personality" and "paranoid".

The Government submits that the short and complete answer to appellant's attack on the use of interpreters by non-Spanish speaking psychiatrists is that it is a factor which goes to the weight of their testimony and not to the admissibility. In addition, to erect such a per se rule under the due process clause would ignore the reality that many of the world's cultures do not recognize psychiatry as we in the United States do. Thus, it might be impossible to find, say, an Albanian speaking psychiatrist who, under appellant's conception of due process, would be the only psychiatrist capable of diagnosing an Albanian who claimed through (one would suppose) his English speaking attorney, that he was insane.

POINT II

The examinations of the psychiatrists testifying for the Government were proper and adequate and their testimony was properly received.

Appellant maintains that the examinations performed by the psychiatrists who testified for the Government were inadequate for various reasons.

First, appellant states that over his "continuing objection," Doctor Chaitin, who was directed to examine Mr. Rios for competency, was allowed to testify at trial as to Mr. Rios' criminal responsibility. It should be noted at the outset that the defense never objected to Doctor Chaitin's testimony on this ground and the page cited in appellant's brief to demonstrate the defense's "continuing objection" on this point, page 493, contains no objection at all. *United States v. Indiviglio*, 352 F.2d 276, 279-280 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Doctor Chaitin's testimony was objected to by the defense on the ground that he should not be permitted to tell the jury what Mr. Rios said about the particular offense (T. 491-492). No such testimony was either asked or elicited (T. 491-493). Significantly, appellant made no objection to Doctor Chaitin's qualifications (T. 489).

While Doctor Chaitin examined Mr. Rios on the issue of competency, he subsequently read reports relating Mr. Rios' words and actions during the offense, which acts and statements were established at trial.

Relying upon *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968) appellant contends that Doctor Chaitin could not testify on the issue of criminal responsibility because he was ordered to examine appellant only on the issue of competency to stand trial. Reliance on *Driscoll* is misplaced. In *Driscoll* this Court held that a psychiatrist who performed an examination as to competency could not then testify as to criminal responsibility because *Driscoll*

could not "reasonably expect" his cooperation in a competency hearing would be utilized for a determination of criminal responsibility. *Driscoll, supra*, at 137.*

Here, Mr. Rios had already been examined by Doctor Schwartz and Doctor Fleetwood on both criminal responsibility and competency. He thus had every reasonable expectation that Doctor Chaitin's subsequent examination would be utilized in the same manner.

Moreover, there is no question that psychiatrists who have examined defendants on the issue of competency can subsequently testify on the issue of criminal responsibility. *United States v. Jacquillon*, 469 F.2d 380, 389 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973); *United States v. Mattson*, 469 F.2d 1234, 1236 (9th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973). See, *United States v. Bohle*, 475 F.2d 872 (2d Cir. 1973); *United States v. Kohlman*, 469 F.2d 247 (2d Cir. 1972).** The key factor in Doctor Chaitin's evaluation of Mr. Rios' criminal responsibility was how appellant behaved at the time of the offense. Doctor Chaitin stated that without knowing what Mr. Rios did, what he said and how he acted at the time of the offense he would not be able to reach a conclusion as to Mr. Rios' mental condition at the time of the offense (T. 500).

* *Driscoll* has been limited to cases involving deceit. *United States v. Matos*, 409 F.2d 1245 (2d Cir. 1969), *cert. denied*, 397 U.S. 927 (1970).

** The recent case of *United States v. Polisi*, — F.2d — (2d Cir., slip op. 2787; decided April 8, 1975) is clearly distinguishable. *Polisi* establishes the proposition that an examination conducted pursuant to 18 U.S.C. § 4208(b) does not satisfy the need for a psychiatric examination to determine competence to stand trial. The Court ruled that such a determination can only be made under § 4244. Here, there is no question that all three psychiatrists conducted their examinations pursuant to § 4244. Appellant's claim is that Doctor Chaitin's examination under § 4244 to determine competency limits his testimony to the issue of competency alone. As the cases cited in the text, *supra*, demonstrate, this contention is without merit.

Doctor Schwartz, who was ordered to examine Mr. Rios on the issues of competency and criminal responsibility, based his expert opinion on that examination and hypothetical questions assuming facts adduced at trial concerning appellant's behavior during the offense charged (T. 568-571). Appellant contends that his examination was improper because it did not disclose that he had tried to commit suicide. Again, the Government submits that this fact goes to the weight and not to the admissibility of Doctor Schwartz's testimony. While defense counsel stressed this fact in cross-examination (T. 582-583) and in summation (T. 648), the jury apparently concurred with the doctor's opinion as to Mr. Rios' criminal responsibility.*

Appellant also contends that Doctor Schwartz's testimony violated the hearsay rule because it was based on Mr. Rios' statements related by an unidentified interpreter (Appellant's brief, page 35). This contention is neither consistent with relevant case authority, *United States v. Santana*, 503 F.2d 710, 717 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 632 (1974) nor the *Proposed Federal Rules of Evidence*, § 703 and § 803(4). Moreover, it is revealing that appellant chose not to subpoena Reverend Nieves, who was the interpreter used by Doctor Chaitin, nor did he object to Doctor Chaitin's testimony on hearsay grounds based on the use of an interpreter.

* With respect to the relation between suicide attempts and insanity, the Supreme Court has recently stated: "Of course we recognize that 'the empirical relationship between mental illness and suicide' or suicide attempts is uncertain. . ." *Drope*, *supra*, — U.S. —, 95 S. Ct. at 908, n. 16 (*citations omitted*).

POINT III

Judge Platt's determination that appellant was competent to stand trial was correct.

A pre-trial hearing was conducted on November 22 and 25 and December 2, 1975 to determine appellant's competency to stand trial. Doctor Schwartz, Doctor Chaitin and Harry Stevens, a medical technician at West Street, testified for the Government. Doctor Fleetwood testified for the defense.

Doctor Schwartz testified that Mr. Rios knew the date of his arrest; told him the authorities found heroin and a large amount of cash in his apartment that day; knew possession of drugs was illegal (C. 43-45); that he understood the nature of the charge against him; understood the functions of the principals in a trial and could assist counsel in his defense (C. 46-47). Doctor Chaitin found appellant to be oriented in time, place and person (C-15); understood the nature of the charges against him and could assist counsel in his defense (C-14).

Doctor Fleetwood, while finding appellant to be schizophrenic and not competent to stand trial (C-31), admitted that she did not know the definition of competency (C-41) and did not discuss the nature of the charges pending against him (C. 38-39). She based her opinion, at least in part, on Mr. Rios' physical complaints such as headaches and sleepless nights but never sought to verify those complaints with the medical staff at West Street (C-45).

Mr. Rios' medical record, introduced at the competency hearing through Mr. Stevens (C-17), revealed that Mr. Rios never complained of the various ailments upon which Doctor Fleetwood, at least in part, based her diagnosis (C. 17-22).

The prevailing test for competency is whether the defendant has sufficient present ability to consult with his

lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960); *United States v. Sullivan*, 406 F.2d 180 (2d Cir. 1969). Concededly, it is not enough that defendant is oriented in time and place and has some recollection of events. Doctors Schwartz and Chaitin, however, specifically testified to Mr. Rios' ability to understand the charges and proceedings and his ability to assist counsel. Since Doctor Fleetwood, herself, did not know the charges pending against Mr. Rios, she could not discuss those charges with him (C. 38-39). Moreover, Mr. Rios' medical records at West Street demonstrated that he never complained to the medical staff about any of the ailments upon which Dr. Fleetwood, at least partially, based her opinion. In light of the above factors Judge Platt was completely justified in finding Mr. Rios competent to stand trial and under recognized standards of review his determination should not be overturned.*

Appellant contends that neither Doctor Schwartz nor Doctor Chaitin was "qualified" under § 4244 because they did not speak Spanish. No cases are cited which support this proposition and appellant is simply espousing a novel interpretation of the statute.** Moreover, even under appel-

* A trial judge's determination of competency is a finding of fact which should not be set aside upon review unless clearly erroneous, *United States v. Sullivan*, *supra*, at 185, or clearly unwarranted or arbitrary, *United States v. Gray*, 421 F.2d 316 (5th Cir. 1970); *Hall v. United States*, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969). Given the overwhelming evidence of competency, Judge Platt's determination was not only not clearly unwarranted or arbitrary, but was correct.

** The cases cited by appellant are clearly inapposite. *Krupnick v. United States*, 264 F.2d 213 (8th Cir. 1959) involved an examination by a medical doctor instead of a psychiatrist; *United States v. Day*, 333 F.2d 565 (6th Cir. 1964) involved an examination by a probation officer instead of a psychiatrist.

lant's novel approach, the so-called statutory requisites were met, since Doctor Fleetwood spoke Spanish.

Finally, it is again significant to point out that at trial no objection was raised to the qualifications of either Doctor Schwartz (T. 561) or Doctor Chaitin (T. 489).

POINT IV

The trial judge properly submitted the case to the jury.

It is well settled that it is a function of the jury to decide the issue of criminal responsibility. *United States v. Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Bohle*, *supra*. Given the fact that two psychiatrists found appellant sane at the time of the offense; that the only psychiatrist to claim appellant was suffering from a mental disease, Doctor Fleetwood, stated appellant, nonetheless, "knew he was doing something illegal . . . I am sure he must have **known that**" (T. 439), and given the fact that Mr. Rios' medical records at West Street revealed that he did not register complaints for any of the symptoms Doctor Fleetwood relied upon to diagnose schizophrenia, a reasonable jury was certainly entitled to conclude, as the jury in this case did, that appellant's criminal responsibility had been established beyond a reasonable doubt. *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), *cert. denied*, — U.S. —, 35 S. Ct. 239 (1974).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: May 16, 1975

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
ROBERT F. KATZBERG,
*Assistant United States Attorneys,
Of Counsel.**

* The United States Attorney's Office wishes to acknowledge the assistance of Jon M. Lewis, Esq., in the preparation of this brief.

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 1042

UNITED STATES OF AMERICA,

—against—

ISABELIO RIOS,

Defendant.

United States Courthouse

Brooklyn, New York

September 4, 1974

10:00 a.m.

Before: HONORABLE THOMAS C. PLATT, *U.S.D.J.*

Official Court Reporter

DANIEL D. SIMON

(7)

*** sent me the report. My secretary got after him since the Court inquired. We have been trying to get him. Finally today, before we came in here, he said he promised to call back my secretary this afternoon and have a report for us. As soon as I get it, a copy will go to the U.S. Attorney and the Court immediately.

The Court: Did your client ever interpose this psychiatric defense in the State Court?

Mr. Shaw: Well, your Honor, let me explain the situation there. After I was assigned in the federal court—I am not on the panel in the state court in New York County, but I have a partner by the name of Mitchel

Horn. Under my recommendation the Supreme Court Justice appointed Mr. Horn, who is no longer my partner, to represent him in the state case.

When I was on trial in May, which is the last time I had a meaningful discussion about the case with Mr. Horn in the Southern District before Judge Lasker on a four-week trial there, Mr. Horn and I were in brief contact because he has not been my partner since before April, and he advised me the case was to come to trial in the New York State Supreme Court. That is the representation I made (8) to Judge Judd on four or five occasions on the phone and two occasions in court, because that was the assurance of the Supreme Court justice and Mr. Horn, that his state case would come up first. In fact, the previous U.S. Attorney had stated that there was a very good possibility if the state case came to trial that the federal case would be nolle.

The state case, to my knowledge, has still not come to trial. Why not I know not, because there is also a speedy trial rule there, and it was calendered, I believe, before this one. It is an older indictment, I believe. I am not sure of that, and it had been given a definite trial date.

Mr. Horn had said he was ready for trial. And the motions, including motions to suppress, I believe had already been ruled on in the state court.

Mr. Corcoran: If I might interject at this point, your Honor, Mr. Shaw probably is not aware that Mr. Rios was convicted in the state court about a month ago.

Mr. Shaw: I didn't even know, Judge.

The Court: Well, my question is, in that case, did he plead insanity?

Mr. Shaw: I don't know, Judge. All I know (9) is that as far as I was concerned, I am only a layman, and as far as the court-appointed interpreter is concerned we couldn't get a meaningful answer out of him even though I speak a little Spanish, and I had the interpreter right with me and we worked together. And I thought he was crazy, and the psychiatrist who went to interview him not giving me back the report yet. I still would put in that defense. If the report comes back and says he is sane, I don't know what I will do. But that was my impression of the man.

Mr. Corcoran: Your Honor, it is my understanding he didn't plead insanity in this state trial. He stood trial and he apparently——

The Court: He pleaded it as a defense, or he pleaded incompetency——

Mr. Corcoran: No, he did not.

The Court: If that is a fact and he faces a lifetime sentence, and I presume he was presented by counsel, I just wonder whether we are wasting time.

Mr. Shaw: I wonder, too, your Honor, because Mr. Horn knew full well that I sent him to a psychiatrist and I didn't have the report yet.

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

} ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

two copies

That on the 20th day of May 19 75 he served ~~copy~~ of the within

Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Stuart R. Shaw, Esq.

233 Broadway

New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

20th day of May 19 75

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977